STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERWIN DALE FINNEY, JR.,

Defendant-Appellant.

UNPUBLISHED
August 10, 1999

No. 206879
Midland Circuit Court
LC No. 97-008302 FH

Before: Hood, P.J., and Fitzgerald and Collins, JJ.

PER CURIAM.

Defendant was convicted of felonious assault, MCL 750.82; MSA 28.277; possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6); prison escape, MCL 750.193; MSA 28.390; first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2); and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to serve two to five years' imprisonment for the prison escape conviction, which sentence was to be served consecutive to the remainder of sentence he was serving prior to his escape. He was sentenced to two years for the felony-firearm conviction, which sentence was to be served consecutive to the prison escape sentence. He was sentenced to three to six years' imprisonment for the felonious assault conviction and three to six years' imprisonment for the felon in possession conviction, which sentences were to be served concurrently with each other but consecutive to the felony-firearm sentence. Lastly, he was sentenced to four to twenty-five years' imprisonment on the first-degree home invasion conviction, which sentence was to run consecutive to the felonious assault and firearm possession sentences. He appeals as of right, and we affirm.

The crimes for which defendant was charged and convicted arose out of an incident in December 1996. At the time, defendant was serving a previous sentence, via an electronic tether, for an OUIL 3rd conviction and was required to remain at his mother's home unless he was at his job or at church. Defendant cut off his tether and went to the home of his ex-wife and her new husband, Shelly and Gary Yarger. Defendant testified that he went there to get his son[1]. While defendant was at the Yargers' home, an altercation took place between defendant and Gary Yarger. Defendant claimed that Gary Yarger came after him with a gun and that he got the gun away from Gary and tried to leave. He

testified that he grabbed a hat rack off of a wall on his way out and that he did so because he was unsure if Gary had another weapon and he wanted to be able to defend himself. He admitted that after he was outside of the home, he threw the hat rack through the glass in the Yargers' front door, but he claimed that he did so because he thought he had heard his son's voice. The Yargers claimed that defendant arrived at their home with a gun and pointed it at Gary, threatening him. A fight ensued, during which Gary wrenched the gun away from defendant and attempted to remove him from the home. Gary testified that Defendant grabbed the hat rack during the scuffle and swung it at Gary. Gary also testified that defendant threw the hat rack through the closed front door after Gary successfully managed to get defendant out of the house.

Defendant fled after breaking the Yargers' front door. He was captured in Florida and returned to Michigan to serve the remainder of his OUIL 3rd sentence and to stand trial on the charges arising out of the incident at the Yargers' home.

Defendant first argues on appeal that he was denied a fair trial where the felon-in-possession charge was not severed from the rest of the charges and where the procedural safeguards set forth in *People v Mayfield,* 221 Mich App 656, 659-660; 562 NW2d 272 (1997) were not followed. We disagree.

In *Mayfield,* a panel of this Court adopted safeguards, which can be followed to ensure that a defendant does not suffer unfair prejudice when he is tried for being a felon-in-possession and other charges at the same time:

> Specifically, (1) the fact of defendant's conviction could be introduced by a stipulation, (2) the court can give limiting instructions emphasizing that the jury must give separate consideration to each count of the indictment, and (3) more specifically, the jury could be instructed to only consider the prior conviction as it relates to [the felon-in-possession prosecution]. [*Id.* at 660, quoting *United States v Mebust,* 857 F Supp 609, 612-613 (ND Ill, 1994).]

While it adopted procedural safeguards to ensure a fair trial, the *Mayfield* Court refused to grant the defendant any relief:

> Defendant did not move to sever the prosecutions, failing even to offer any type of objection below, which is to say, defendant has failed to preserve this issue. The purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice. While all of the prophylactic measures described in *Mebust* were available to defendant, he availed himself of none. Thus, defendant now seeks that we grant him a second and third trial, based on one criminal transaction and in which the evidence produced would be identical to that produced in the first trial, when the reason his concerns were not addressed below is due entirely to his inaction below. In light of the fact that defendant took no action to prevent the possibility of prejudice

> below, we decline to grant defendant the relief he seeks. [*Id.* at 660-661 (citations omitted).]

In *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998), this Court reviewed defendant Green's argument in similar circumstances where he had failed to move to sever the charges or to make any objections at trial. The prospective jury was informed by the trial court that Green was "charged with possessing a firearm when ineligible to do so because of a prior conviction of larceny from a person." *Id.* at 691. During trial, however, after the possibility of prejudice was discussed, the parties agreed to stipulate that Green had been convicted of an unspecified felony. This Court held that there was no manifest injustice:

> In this case, the fact of Green's prior felony conviction was introduced by stipulation, the specific nature of Green's prior conviction was not mentioned apart from the initial remark to the prospective jury panel, and the trial court instructed the jury that defendants were entitled to a separate determination regarding each of the charges against them. Although the trial court did not give a specific instruction that the stipulation was to be considered only as it related to Green's felon-in-possession charge, Green never requested such an instruction. Because adequate safeguards were in place at trial, manifest injustice will not result from our failure to review this issue. [*Id.*, citing to *Mayfield, supra* at 661.]

The conclusion reached in *Green, supra* reinforced that although procedural safeguards have been adopted by this Court, error requiring reversal is not automatic where all the safeguards are not utilized. The facts and circumstances of each case must be considered.

We conclude, as did the *Mayfield* panel, that defendant is not entitled to relief where there were safeguards available and defendant chose not to utilize or request them.

> A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. To do so would allow a defendant to harbor error as an appellate parachute. [*Green, supra* at 691 (citation omitted).]

We also note that the fact that defendant failed to utilize the available procedural safeguard of stipulating that a prior, unspecified felony has been committed, appears to be part of his trial strategy. If defendant stipulated that he had previously been convicted of an unspecified felony, like the defendant in *Green* did, the jury may have been left with the impression that defendant was a prior, violent criminal offender instead of a non-violent, alcohol offender.

Defendant next argues that his counsel was ineffective for failing to move to sever the felon-in-possession charge from the other charges and for failing to object at trial. We disagree.

Where, as here, a defendant fails to move for a new trial or evidentiary hearing, our review is limited to errors that are apparent from the trial court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). In order to establish a claim of ineffective assistance of counsel, a

defendant must show that counsel's performance fell below an objective standard of reasonableness *and* that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Mitchell, supra.* "The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *Stanaway, supra.*

We conclude that defense counsel's performance did not fall below an objective standard of reasonableness where his actions with regard to the OUIL 3rd conviction appear to be trial strategy and where defendant has failed to overcome the strong presumption that his counsel engaged in sound trial strategy. Even if, however, counsel's performance fell below an objective standard of reasonableness, there has been no showing by defendant that "there was a reasonable probability that the result of the proceeding would have been different" if counsel had moved to sever the charges or employ procedural safeguards to minimize the prejudice.

Defendant next argues that certain testimony elicited at trial was irrelevant and extremely prejudicial, specifically testimony regarding to guns in the house where defendant was serving his OUIL 3rd sentence, testimony about guns that defendant owned prior to his divorce from Shelly Yarger, and testimony about Shelly Yarger's whereabouts during the divorce. The issues with regard to this testimony are not preserved where no objections were made to the testimony. *People v Potra,* 191 Mich App 503, 512; 479 NW2d 707 (1991). Moreover, the record reveals that the above testimony was elicited as part of, or in response to, defendant's trial strategy. Defendant claimed that he did not have access to the gun used in the incident and that the Yargers were in possession of it because Shelly had taken it during the divorce proceedings. The aforementioned testimony directly related to that theory. Defendant also complains that testimony about a personal protection order obtained against him by Shelly Yarger during the divorce was irrelevant and prejudicial. The testimony about the personal protection order was elicited, however, by defendant's own counsel on direct examination of defendant, and a clear record was made that it was elicited as part of defendant's trial strategy to discredit Shelly Yarger. A defendant may not claim as error on appeal evidence that he purposely used in support of his defense theory. *Potra, supra.*

Defendant next argues on appeal that the trial court erred when it refused to instruct the jury that it could not consider the hat rack to be a dangerous weapon in determining the felonious assault charge. With regard to the felonious assault charge, the jury was instructed, in part, that there had to be proof "*that defendant committed the assault with a revolver.*" During deliberation, the jury apparently questioned whether they could consider the hat rack as a dangerous weapon for the assault charge. After the request, the instructions were amended by consent of the parties and a more general instruction was given. The jury was informed that it needed to find that the defendant committed the assault with a dangerous weapon and not that it needed to find that defendant committed the assault with a revolver.

Prior to the jury rendering its verdict, the parties requested that the jury be advised that it could not convict on the felonious assault charge unless it found that the assault had been committed with the

revolver. Apparently the parties were concerned that the change in the felonious assault instruction allowed for the possibility that the jury would convict based on an uncharged assault, stemming from defendant's use of the hat rack to try and hit Gary Yarger. The trial court refused to re-instruct the jury and the jury convicted defendant of felonious assault. The crux of the trial court's position was that, since the jury was lawfully and properly instructed, it was not error to refuse to constrict the case to the use of a revolver.

Contrary to defendant's position, the issue here is not whether the amended instruction amounted to improperly amending the Information, but rather, is whether the instruction at issue constitutes error requiring reversal. We hold that there is no error requiring reversal.

We review jury instructions in their entirety to determine if there was error that requires reversal. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). There is no error as long as the jury instructions "fairly presented the issues to be tried and sufficiently protected a defendant's rights." *Id.* at 252-253. Moreover, a conviction shall not be reversed based on imperfect jury instructions where the error is harmless. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998).

In this case, even if the jury instruction was imperfect where the jury was originally instructed that it had to find that the assault occurred with a revolver[2] but later instructed that it only had to find that the assault was committed with a dangerous weapon, any error clearly did not affect the verdict. The jury found defendant guilty of felony-firearm, felon-in-possession, and first-degree home invasion using a dangerous weapon. All of these convictions required the jury to find, beyond a reasonable doubt, that defendant possessed the firearm. It is inconceivable that the jury found defendant guilty of felonious assault based on his swinging the hat rack at Gary Yarger during the altercation. If the jury had convicted defendant based on his use of the hat rack, the convictions for felony-firearm and felon-in-possession would have been inconsistent.

Defendant next argues that the jury should have been instructed on simple assault and battery as a lesser offense to the felonious assault. We disagree. A rational view of the evidence did not support an assault and battery instruction and thus, the trial court was not required to instruct on the lesser misdemeanor. *People v Dabish*, 181 Mich App 469, 473-474; 450 NW2d 44 (1989), citing *People v Steele*, 429 Mich 13, 412 NW2d 206 (1987).

Assault and battery requires a finding of willful touching of another by the aggressor or some object put into motion by the aggressor. *People v Solak*, 146 Mich App 659, 666; 382 NW2d 495 (1985). Pursuant to defendant's version of the facts, Gary Yarger was the aggressor. Consequently, an assault and battery instruction does not comport with defendant's theory of the case.

The Yargers' version was that defendant entered their home with a gun, scared them, and that a fight ensued wherein defendant punched Gary and stated, during the struggle, "you're dead". This version of the facts does not support a misdemeanor assault and battery instruction because, if the jury believed the Yargers, defendant clearly had a weapon during the assault and thus, a felonious assault conviction was required.

A trial court only abuses its discretion in failing to give a lesser misdemeanor instruction "if a reasonable person would find no justification or excuse for the ruling made." *People v Malach,* 202 Mich App 266, 276; 507 NW2d 834 (1993). In this case, there was justification for the trial court's determination that there was no set of facts upon which the jury could convict of simple assault and battery as opposed to felonious assault. There was no abuse of discretion and there is no error requiring reversal.

Defendant next argues that his sentence was not proportionate to the offense or the offender. Defendant does not argue that the trial court incorrectly applied the law with regard to how his sentences run concurrently and consecutively with each other. He also does not argue that any one sentence was disproportionate. He argues, however, that the cumulative effect of the sentences is disproportionate.

Defendant's argument has no merit. He was convicted of five separate crimes, was properly sentenced as an habitual offender, second offense, and was given appropriate and proportionate sentences for each individual conviction.

> In determining the proportionality of an individual sentence, this Court is not required to consider the cumulative length of consecutive sentences. Rather, our inquiry is whether each sentence is proportionate. [*People v St. John,* 230 Mich App 644, 649; 585 NW2d 849 (1998), citing *People v Miles,* 454 Mich 90, 95; 559 NW2d 299 (1997).]

Defendant next argues that he should have been permitted to give his own closing argument. The record does not support that defendant was denied the opportunity to give a closing argument. At the beginning of the second day of trial, defendant inquired as to whether he could give his own closing argument and the trial court informed him as follows:

> You can make the decision to represent yourself at any point that you like. We'll just spend some time *whenever* you do that just making sure that you understand what the consequences might be as best we can. . . .

Defendant never raised the issue of representing himself again. Where the record fails to support defendant's claim, he has failed to establish error requiring reversal. See *People v Warren,* 228 Mich App 336, 356; 578 NW2d 692 (1998).

Defendant next argues that he was never arraigned on the five felony charges in circuit court. This argument is not supported by the record. The district court, acting on behalf of the circuit court, arraigned defendant on all five of the charges at the end of the preliminary examination.

Defendant next argues that he was never arraigned on the habitual offender charge. There is no authority to support that a defendant must be arraigned on an habitual offender charge and defendant cites to no authority to the contrary. Habitual offender provisions are "merely sentence enhancement mechanisms rather than substantive crimes." *People v Zinn,* 217 Mich App 340, 345-347; 551 NW2d 704 (1996). See also, *People v Connor,* 209 Mich App 419, 426; 531 NW2d 734 (1995)

where the Court stated that "[t]he habitual offender statute does not create a substantive crime that is separate from and independent of the principle charge." The record indicates that the prosecutor gave proper notice of the habitual offender charge and that defendant was made aware of that charge by his counsel. Thus, there is no error requiring reversal.

Finally, defendant argues that the trial court should have dismissed the felony-firearm and home invasion charges because they were added by the prosecutor to punish defendant for insisting on a preliminary examination for the original three charges, which were the felonious assault, prison escape and felon-in-possession charges. We disagree. There is nothing in the record to indicate that the prosecutor added additional charges to be vindictive.

Affirmed.

/s/ Harold Hood
/s/ E. Thomas Fitzgerald
/s/ Jeffrey G. Collins

[1] Defendant and Shelly Yarger had two children who were residing with the Yargers.

[2] The original instruction comported with CJI2d 17.9 where it specified the weapon used in the assault.